No. 04-903

IN THE

Supreme Court of the United States

SFPP, L.P.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF NAVAJO REFINING COMPANY, L.P., CONOCOPHILLIPS COMPANY, VALERO MARKETING AND SUPPLY COMPANY, ULTRAMAR INC., AND WESTERN REFINING COMPANY, L.P. IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the court of appeals was inconsistent with this Court's decision in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932).

PARTIES TO THE PROCEEDINGS BELOW

SFPP, L.P. was a petitioner before the United States Court of Appeals for the District of Columbia Circuit, as well as an intervenor in support of respondent Federal Energy Regulatory Commission ("FERC"). The following parties were petitioners before the court of appeals, as well as intervenors in support of FERC: Navajo Refining Company, L.P.; Western Refining Company, L.P.; Valero Marketing and Supply Company; BP West Coast Products LLC; Texaco Refining and Marketing, Inc.; and Chevron Products Company (collectively "shipper-petitioners"). The following parties were intervenors in support of shipper-petitioners before the court of appeals: ConocoPhillips Company; Valero Energy Corporation; Ultramar Inc.; and ExxonMobil Oil Corporation.

RULE 29.6 STATEMENT

ConocoPhillips Company states that it has no parent corporation and that no publicly held company owns 10 percent or more of the stock of ConocoPhillips Company.

Navajo Refining Company, L.P., states that its parent corporation is Holly Corporation. Holly Corporation is the only publicly held company that owns directly or indirectly 10 percent or more of the partnership interests in Navajo Refining Company, L.P.

Ultramar Inc. states that its parent is Valero Energy Corporation. Valero Energy Corporation is the only publicly traded company that holds a greater than 10 percent ownership interest in Ultramar Inc.

Valero Marketing and Supply Company states that it is a wholly owned indirect subsidiary of Valero Energy Corporation. The common stock of Valero Marketing and Supply Company is owned by a group of seven corporations (including Ultramar Inc.), each of which is a wholly owned subsidiary of Valero Energy Corporation. Valero Energy Corporation is the only publicly traded company that holds a greater than 10 percent ownership interest in Valero Marketing and Supply Company.

Western Refining Company, L.P., states that it is a Delaware limited partnership that is owned by RHC Holdings, L.P. (99%) and Refinery Company, L.C. (1%). No publicly held company holds a 10 percent or greater ownership interest in Western Refining Company, L.P.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a) is reported at 374 F.3d 1263. The orders of the court of appeals denying rehearing and rehearing en banc (Pet. App. 148a-153a) are not reported. The opinions on review in this case of the Federal Energy Regulatory Commission

("FERC" or "Commission") are reported at 86 F.E.R.C. (CCH) ¶ 61,022; 91 F.E.R.C. (CCH) ¶ 61,135; 96 F.E.R.C. (CCH) ¶ 61,281; and 97 F.E.R.C. (CCH) ¶ 61,138. Portions of those orders appear at Pet. App. 80a-101a, 107a-135a.

JURISDICTION

The decision of the court of appeals was entered on July 20, 2004. On October 4, 2004, the court denied petitions for rehearing and rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case concerns whether petitioner SFPP, the owner and operator of a pipeline for refined petroleum products, must return to shippers the amounts by which certain interim rates exceeded just and reasonable rates. Petitioner charged such interim rates while FERC concluded complex ratemaking proceedings to determine whether petitioner's rates were just and reasonable. During the course of those proceedings, FERC required petitioner to make "compliance filings," which included cost information and an explanation of methodology together with recalculated rates that eliminated certain previously identified errors. In the orders directing petitioner to make compliance filings, however, FERC did not prescribe particular rates; it did not specify maximum or minimum rates; it did not find any proposed rate to be just and reasonable; and it allowed petitioner's proposed compliance rates to go into effect on an interim basis on the condition that petitioner refund any difference between the interim rates and the rates that were ultimately accepted as just and reasonable. Petitioner asserts that FERC, in proceeding in that fashion, contravened the rule established in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932). As explained below, that contention is without merit.

A. Statutory Background

The Interstate Commerce Act of 1887, as amended, ("ICA") regulates interstate common carriers transporting oil (including refined petroleum products) by pipeline. 49 U.S.C. § 1(1).[1] Under the Act, "charges made for any service rendered * * * in the transportation of" such materials must be "just and reasonable," and "every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful." 49 U.S.C. § 1(5).

Pipelines must file rate schedules with the Commission. 49 U.S.C. § 6(1). The Act specifically provides that, if the Commission (on complaint or its own motion) determines that the rates are "unjust or unreasonable * * * or otherwise in violation of" the Act, it has authority "to determine and prescribe what will be the just and reasonable" rate. 49 U.S.C. § 15(1). In addition, if a carrier proposes a new rate, the Commission may suspend the proposed rate for a maximum of seven months, pending an investigation into the rate's lawfulness. 49 U.S.C. § 15(7). If the Commission has not found the rate unlawful at the end of the seven-month suspension period, the carrier may put the rate into effect. *Id.* Nonetheless, the Commission may require the carrier to keep an accounting of its collections under that rate and, at the end of the investigation, order the carrier to make refunds if the rate is not just and reasonable. *Id.*

The Commission also may require the payment of "damages" (often referred to as "reparations") for violations of the Act. 49 U.S.C. §§ 8, 9. In particular, 49 U.S.C. § 16(1) authorizes the Commission to award damages (typically the

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[1] Although the Interstate Commerce Act of 1887 was otherwise repealed in 1978, it continues to apply to oil pipelines. See Pet. 2 n.1. All citations for the Interstate Commerce Act of 1887 in this brief refer to the 1976 edition of Title 49 of the United States Code, 49 U.S.C. §§ 1-27 (1976).

difference between the charged rate and the just and reasonable rate) to any party who has filed a complaint under 49 U.S.C. § 13.

Finally, the Act expressly provides that those enumerated powers are not exclusive: "The foregoing enumeration of powers *shall not exclude* any power which the Commission would otherwise have in the making of an order under the provisions of this chapter." 49 U.S.C. § 15(16) (emphasis added). This Court has concluded that the Commission retains, in addition to its enumerated powers, "ancillary" powers not expressly enumerated in the Act, so long as the power is not foreclosed by the Act. *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978); see also *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-585 (1942); *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

B. Proceedings In This Case

1. *Proceedings Before FERC*

This case has its origins in complaints filed with FERC by various shippers beginning in 1992. The respondents joining this brief—Navajo Refining Company, L.P. ("Navajo"), ConocoPhillips Company ("ConocoPhillips"), Valero Marketing and Supply Company ("Valero"), Ultramar Inc. ("Ultramar"), and Western Refining Company, L.P. ("Western")—were complainants before FERC and/or intervenors in support of FERC before the court of appeals on the issue raised here.

The complaints filed at FERC alleged that petitioner's rates for transportation of refined petroleum products on its interstate pipelines serving Arizona were unjust and unreasonable. The ratemaking issues raised by the complaints were complex and, in many instances, involved questions of first impression for the Commission. Pet. App. 2a-3a. Following extensive proceedings, see *id.* at 86a-89a, the Commission in January of 1999 issued an "Order on

Initial Decision." *Id.* at 80a-101a. That opinion—denoted "Opinion No. 435"—lies at the core of petitioner's request for further review.

Opinion No. 435 did not find that petitioner's rates were unjust and unreasonable; nor did it prescribe a rate for the future. Rather, after addressing various cost-of-service and cost-allocation issues, the Commission made the probabilistic determination that the rates for petitioner's "East Line" (between El Paso, Texas, and Phoenix and Tucson, Arizona) "*may not be* just and reasonable for the year ended December 31, 1994." Pet. App. 99a (emphasis added). The Commission explained that "some of the theories with which [petitioner] sought to defend its East Line rates were not justified on this record." *Id.* at 98a. "To the extent that the current level of [petitioner's] East Line rates depends on those theories or arguments," the Commission found that the rates "may not be just and reasonable." *Id.*

The Commission required petitioner to make a "compliance filing" with cost information and rate calculations (including an explanation of "how the rate was devised" and "supporting memorandum work papers") in conformity with the Commission's opinion, so that the Commission could determine whether the rates were just and reasonable. *Id.* The Commission explained that, if the compliance filing demonstrated that the previous East Line rates were "just and reasonable," the complaints would be dismissed; if those "rates are determined not to be just and reasonable * * * , the Commission will determine at a later date whether reparations should be made." *Id.* at 99a. The Commission did not prescribe rates for petitioner. To the contrary, it clarified that petitioner was not required to reduce its rates, but could "raise the rates to a higher level" to the extent that the resulting rate would be "just and reasonable" and consistent with the order. *Id.* at 98a-99a.

On March 15, 1999, petitioner responded by filing additional materials and new rates. On April 14, 1999, the Commission issued an order that, without approving the rates, "accepted" and "suspended" petitioner's proposed rates, "subject to" the condition that petitioner refund any amounts determined to be unreasonable based on "the outcome of ongoing proceedings." Pet. App. 102a. The Commission made it clear that it was not yet ruling on whether the rates were just and reasonable: "[B]ecause of the ongoing investigation and review of the proposed rates in the compliance filing, the proposed tariff rates * * * cannot be determined to be just and reasonable until review of the compliance filing in Docket No. OR92-8-001, *et al.* is complete." Pet. App. 105a.

On May 17, 2000, the Commission ruled on certain petitions for rehearing and protests to petitioner's compliance filing, directing petitioner to make a revised compliance filing. Pet. App. 107a-112a ("Opinion No. 435-A"). The Commission rejected petitioner's claims that the revised tariffs "were prescribed by the Commission" itself and were therefore not subject to suspension or refund. *Id.* at 111a. On the contrary, while the prior opinions included certain "instructions on how to design th[e] rates," the instructions did not predetermine or approve rates. *Id.* at 111a-112a. Indeed, the Commission observed that the methodology had not even been finalized since several challenges raised in requests for rehearing and protests to petitioner's compliance filings remained under consideration. *Id.* Responding in greater detail to the same argument in a later order, the Commission elaborated:

> Here, the Commission has not declared what are the maximum reasonable rates to be charged by [petitioner] for its East Line services. The prior opinions issued by the Commission and the filings made by [petitioner] to comply with those opinions are part of the process leading to a finding of what the specific

> reasonable rates should be. That finding, however, has not yet been made.
>
> * * * * *
>
> For this reason, the first purpose of the various opinions issued in this proceeding is to arrive at the correct methodology for establishing oil pipeline rates under the Commission's Opinion No. 154-B methodology * * * . As such, none of the prior opinions or orders in these proceedings have established a final, specific rate level that [petitioner] should include in any final and definitive compliance filing. In fact, it became clear after the issuance of Opinion No. 435 that the large number of requests for rehearing and continued review of technical issues raised by comments to [petitioner's] first compliance filing (that to Opinion No. 435), would necessitate a further compliance filing.
>
> * * * * *
>
> Finally, the Commission emphasizes that its action in this case does not violate the doctrine in *Arizona Grocery* * * * . This cannot occur under a situation where the Commission has expressly reserved its authority in the context of an ongoing proceeding in which the methodology for determining the rate had not even been established. This is in direct contrast to the situation that occurred in *Arizona Grocery*.

Pet. App. 143a-144a, 146a (footnotes omitted). The protracted nature of the proceeding, FERC further observed, was in part a result of "the numerous objections to the prior orders by [petitioner] itself" and "technical problems in [petitioner's] compliance filings, some of which involved clear over-reaching." *Id.* at 145a.

When petitioner made a new, revised filing in response to Opinion No. 435-A, the Commission again accepted and suspended the proposed rates, subject to a refund con-

dition. The Commission noted that the filing was still subject to protests and unresolved rehearing requests from Opinion No. 435-A, which would be addressed in later orders. See *SFPP, L.P.*, 92 F.E.R.C. (CCH) ¶ 61,166 at 61,563 (2000) (reproduced App., *infra*, 1a-4a).[2] Ruling on those protests and rehearing requests in September of 2001, the Commission again required petitioner to submit a compliance filing and revised tariffs. Pet. App. 113a-128a ("Opinion No. 435-B"). On November 7, 2001, the Commission granted rehearing and clarified the scope of that order. *Id.* at 129a-135a.

Petitioner and others then filed the petitions for review before the United States Court of Appeals for the District of Columbia Circuit that are the subject of this petition for a writ of certiorari. However, the compliance process before FERC continued, resulting in further orders, including the last order on June 5, 2003. 103 F.E.R.C. (CCH) ¶ 61,287 (2003). Those later orders were also subject to petitions for review, which are now pending before the District of Columbia Circuit in Docket Nos. 02-1112, *et al.*

2. *The Court Of Appeals' Decision*

The court of appeals affirmed in relevant part. Pet. App. 63a-66a.[3] Most important for present purposes, the court of appeals agreed with the Commission's conclusion that its rulings were consistent with this Court's decision in *Arizona Grocery*. The court of appeals explained that "*Arizona Grocery* applies only where the Commission has 'declared what is the maximum reasonable rate.'" *Id.* at 63a

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[2] That "Order on Compliance and Tariff Filing" is not included in the appendix to the petition for a writ of certiorari. For the Court's convenience, it is reproduced as an appendix to this brief.

[3] With respect to certain other issues, the court of appeals concluded that FERC's analysis was deficient and remanded for further proceedings. See, *e.g.*, Pet. App. 7a-10a; *id.* at 10a-11a; *id.* at 29a-43a; *id.* at 51a-52a.

(quoting *Arizona Grocery*, 284 U.S. at 390). Although petitioner argued that "Opinion No. 435 was a final order setting rates," the court of appeals disagreed: "FERC did not finalize a maximum reasonable rate in Opinion No. 435 and in fact repeatedly stated that it was not doing so." *Id.*

The submissions required by Opinion No. 435 and later orders, the court of appeals explained, were "compliance filings" that "showed [petitioner's] calculations for" its East Line rates consistent with the Commission's orders. Pet. App. 64a. The orders were not rate prescriptions: "The record shows that at each point, the Commission said that final East Line rates would not be established until the OR92-8 proceedings were completed." *Id.* at 64a. "The Commission has thus been clear from the outset and throughout that no final rate determination would be made until the * * * proceedings were complete." *Id.* at 65a. Indeed, the Commission had "expressly reserved authority to make adjustments in the context of" this single "ongoing proceeding in which the methodology for determining the rate had not even been established." *Id.* Consequently, "the Commission's orders * * * [did] not violate the prohibition in *Arizona Grocery* from subjecting a carrier to payment of reparations with respect to a final rate." *Id.*

The court of appeals further observed that FERC has authority to require carriers to file interim rates, subject to a refund of any amounts ultimately determined unjust or unreasonable, during the course of an ongoing proceeding to determine reasonableness. "[N]othing in Section 15(1) prohibits FERC from directing a pipeline to file an interim rate, subject to suspension and refund, if there is a possibility that the final rates will be lower than the interim rates." Pet. App. 66a. "Indeed," the court of appeals continued, in a similar context "the Supreme Court has held that under the ICA the Commission has authority * * * to direct an oil pipeline to file interim rates to go into effect, subject to refund * * * ." *Id.* (citing *Trans Alaska Pipeline*

Rate Cases, 436 U.S. at 654-656 (upholding FERC's authority to direct the filing of interim rates during the suspension period for initial rates)).

ARGUMENT

The decision below does not present the question on which petitioner seeks review. It does not conflict with the decisions of any other court of appeals or of this Court. And it is correct on the merits. Accordingly, further review is not warranted.

A. This Case Does Not Present The Question On Which Petitioner Seeks Review

Petitioner's sole contention is that the decision below conflicts with this Court's decision in *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370 (1932). But that contention rests on a fundamentally incorrect reading of the decision below. Contrary to petitioner's assertions, the decision below nowhere holds that FERC can impose damages on a carrier for having charged a rate that FERC itself prescribed. To the contrary, the court of appeals concluded that FERC *had not prescribed* the rates FERC later determined to be unjust and unreasonable. The petition thus challenges a holding that the court of appeals never made.

1. As explained in greater detail below, see pp. 17-18, *infra*, *Arizona Grocery* involved a series of Interstate Commerce Commission ("ICC") proceedings addressing the rates for shipping sugar from California to Arizona. In the first proceeding, the ICC had exercised its authority to *prescribe rates* by "order[ing] the establishment of a rate not exceeding" 96.5 cents per hundred pounds. 284 U.S. at 381-382; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Arizona Grocery Co., et al.*, 49 F.2d 563, 564 (9th Cir. 1931); *Phoenix Chamber of Commerce* v. *Director General*, 62 I.C.C. 412 (1921). In a later proceeding, the ICC nonetheless redetermined the just and reasonable rate and imposed damages

on carriers for the difference between the new just and reasonable rate and the prior rates, even though those prior rates complied with the 96.5-cent maximum that the ICC had prescribed.

This Court concluded that the ICC cannot alter retroactively a maximum reasonable rate the agency itself has prescribed. The Court explained that when the ICC does not merely accept rates but exercises its authority to *prescribe* rates—authority that was not originally in the Interstate Commerce Act of 1887, but was added through two later amendments[4]—it acts in a quasi-legislative capacity: When the Commission "*declares a specific rate to be the reasonable and lawful rate for the future*, it speaks as *the Legislature*, and its pronouncement has the force of a statute." 284 U.S. at 386 (emphasis added). In the case before it, the Court held that the ICC's final order in earlier proceedings had "declared in terms that 96.5 cents was, and for the future would be, a reasonable rate." *Id.* at 387.

The Court held that such a "legislative" pronouncement is not subject to retroactive revision:

> Where the Commission has, upon complaint, and after hearing, declared *what is the maximum reasonable rate to be charged by a carrier*, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by *declaring its own finding as to reasonableness erroneous*, subject a carrier which conformed thereto to the payment of reparation

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[4] The authority to prescribe rates thus is distinct from the Commission's other powers and, concomitantly, has distinctive origins. "Under the Act of 1887 the Commission was without power either to prescribe a given rate thereafter to be charged * * * or to set a maximum rate for the future * * * for the reason that so to do would be to exercise a legislative function not delegated to that body by the statute." *Arizona Grocery*, 284 U.S. at 385.

> measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.

Id. at 390. Expanding on that analysis, the Court stated that the ICC's contrary position "arose from a failure to recognize that when it prescribed a maximum reasonable rate for the future, it was performing a legislative function, and that when it was sitting to award reparation, it was sitting for a purpose judicial in its nature." 284 U.S. at 389. When operating in that "second capacity," the ICC "was bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with retroactive effect." *Id.*

Here, petitioner asserts that the court of appeals' decision conflicts with *Arizona Grocery* because (according to petitioner) the decision below holds that "a carrier can be liable in damages for movement *under a rate prescribed by the FERC*." Pet. 10 (emphasis added); see Pet. 9 ("The decision below * * * holds that carriers can be forced to pay damages from rates they filed and collected *pursuant to an agency's rate prescription order*.") (emphasis added); Pet. 8 ("[T]he court of appeals upheld FERC's award of retroactive relief from *Commission-prescribed rates*.") (emphasis added). Petitioner's question presented similarly asks whether "an agency can order a common carrier to pay damages for charging *a rate the agency itself had previously prescribed*." Pet. i (emphasis added).

The court of appeals, however, did not hold that an agency can award damages against a carrier for having charged a rate that *the agency itself had prescribed*. See Pet. App. 63a (explaining that *Arizona Grocery* prohibits "the retroactive revision of established rates through ex post reparations") (quoting *Verizon Tel. Cos.* v. *FCC*, 269 F.3d 1098, 1107 (D.C. Cir. 2001)). Instead, the court of appeals rejected petitioner's claim that FERC's Opinion No. 435 *prescribed* a rate: "[Petitioner] argues that Opinion

No. 435 was a final order setting rates 'to be thereafter observed' under [Interstate Commerce Act] Section 15(1) * * *. We disagree." Pet. App. 63a. As the court of appeals explained, far from prescribing rates, FERC had merely required petitioner to submit "compliance filings" showing its "calculations." No rate was specified; the only restriction was that petitioner not repeat the errors identified in the prior orders. *Id.*

Petitioner's request for further review, as well as the claimed importance of this case, thus rests on a purported holding the court of appeals nowhere made—that FERC can revisit and retroactively deem unreasonable rates that FERC itself had previously prescribed. In the language of *Arizona Grocery*, the Commission simply had not exercised the "quasi-legislative" authority of "prescribing a maximum reasonable rate for the future." Consequently, the precise question on which petitioner seeks review—whether FERC may impose damages against a carrier "for charging a rate the agency itself had previously prescribed," Pet. i—is not presented here.

For similar reasons, the decision below does not conflict with *Arizona Grocery*. That case turned on the fact that the ICC itself had "ordered the establishment of a rate not exceeding" 96.5 cents and had "declared in terms that 96.5 cents was, and for the future would be, a reasonable rate." 284 U.S. at 387. This Court reasoned that, when the ICC decided the reparations issue, it was "bound" to adhere and give effect to its prior "legislative" determination "prescrib[ing] a maximum reasonable rate for the future." *Id.* at 389. That reasoning has no application where, as here, FERC did not, in a prior order, "declare[] in terms that" a particular rate "was, and for the future would be," reasonable. Simply put, here there is no "legislative" rate prescription and thus no prescription to which the Commission must be "bound." *Id.* at 387, 389.

2. Petitioner erroneously assumes that the Commission prescribed final rates for the future within the meaning of *Arizona Grocery* despite the Commission's clear and repeated statements to the contrary. Whether a particular FERC opinion in this lengthy dispute prescribes a rate is a highly case-specific question that does not warrant further review. The court of appeals carefully reviewed the specific language, content, and effect of the Commission's orders. It determined, based on those case-specific considerations, that the Commission had not prescribed a specific (or a maximum or minimum) rate. Pet. App. 63a-65a. The petition nowhere sets forth a compelling reason for this Court to revisit that narrow determination.

The court of appeals, in any event, correctly concluded that Opinion No. 435 neither prescribes a rate nor determines that a particular rate is reasonable. That FERC opinion does state that "SFPP's East Line rates *may not* be just and reasonable for the year ended December 31, 1994 for the reasons stated in this order." Pet. App. 99a (emphasis added). And it required petitioner to make a "compliance filing" that sets forth petitioner's calculations and methodology for a new rate (that does not incorporate previously identified errors). But Opinion No. 435 made it clear that, depending on the contents of the compliance filing, the Commission might conclude that the past rates *were* just and reasonable. If the East Line rates are "determined just and reasonable," the Commission stated, "the complaints against the East Line rates" for the relevant period "will be dismissed." *Id.* Conversely, the Commission declared that, "if the East Line rates are determined not to be just and reasonable, * * * the Commission will determine at a later date whether reparations should be made based on the compliance filing." *Id.* Indeed, the Commission left open the possibility that petitioner could, in the compliance filing, justify a *higher* rate. *Id.* at 98a-99a (explaining that petitioner might be able to "raise the rates

to a higher level"). The Commission's order thus does not prejudge the reasonableness of any particular proposed rate and cannot be read as "prescribing" a rate for the future.

In fact, one searches the FERC orders in vain for a Commission mandate for (or approval of) a particular rate. No specific rate is mentioned. None is identified as reasonable or unreasonable. See *Arizona Wholesale Grocery Co.* v. *Southern Pac. Co.*, 68 F.2d 601, 602-609 (9th Cir. 1934) (identifying the language used by the ICC when approving or prescribing a rate with cases in which the rate is left open); *Pitzer Transfer Corp.* v. *Norfolk & W. Ry. Co.*, 10 F. Supp. 436 (D. Md. 1935) (*Arizona Grocery* limits the award of reparations only when the ICC specifically prescribes a rate for the future by order). Nor did the Commission identify a methodology so specific that it was tantamount to prescribing a particular rate. See *OXY USA, Inc.* v. *FERC*, 64 F.3d 679, 699 (D.C. Cir. 1995). To the contrary, as the court of appeals observed, "the methodology for determining the rate had not even been established" when Opinion No. 435 was issued; numerous issues remained to be resolved on rehearing and in orders addressing petitioner's compliance filings. Pet. App. 65a. Simply put, the Commission did not "exercise [prescriptive] authority by fixing rates or rate limits for the future." *Arizona Grocery*, 284 U.S. at 388.

Petitioner's contrary implication rests almost exclusively on one ordering clause in Opinion No. 435, which states: "Within 30 days after this order issues SFPP shall file revised tariffs reflecting the changes to the calculation of its East Line rates required by this order * * * ." Pet. 6 n.5 (citing Pet. App. 99a). But that lone sentence is taken out of context. By its terms, it requires only that the compliance filing and recalculated rate not incorporate errors already identified by the Commission. It does not designate a specific rate as reasonable or unreasonable. Moreover, as ex-

plained above, the rest of Opinion No. 435 makes it clear that the Commission was not itself setting a rate or resolving the reasonableness of any proposal; the Commission instead left it to petitioner to choose the rate, allowing petitioner to propose a new rate that is the same, higher, or lower. See pp. 14-15, *supra* (citing and quoting Pet. App. 99a).

The Commission itself, after reviewing Opinion No. 435 and succeeding orders, thus rejected the argument that it had prescribed rates. It observed:

> Here, the Commission had not declared what are the maximum reasonable rates to be charged by [petitioner] for its East Line services. The prior opinions issued by the Commission and the filings made by [petitioner] to comply with those opinions are part of the process leading to a finding of what the specific reasonable rates should be. That finding, however, has not yet been made.

Pet. App. 143a. The D.C. Circuit, reviewing the text and context of the same orders, came to precisely the same conclusion. The Commission, the court emphasized, was "clear from the outset and throughout that no final rate determination would be made until the OR92-8 proceedings were complete." Pet. App. 65a; see, *e.g.*, *id.* at 105a (FERC order specifying that, "because of the ongoing investigation and review of the proposed rates in the compliance filing, the proposed tariff rates * * * cannot be determined to be just and reasonable until review of the compliance filing in Docket No. OR92-8-001, *et al.* is complete"). There is no good reason for this Court to conduct yet a third review of the same series of orders.

B. The Court Of Appeals' Decision Does Not Conflict With *Arizona Grocery*

The court of appeals' decision in this case does not conflict with *Arizona Grocery* for a second reason, apart

from the fact that FERC did not prescribe rates in Opinion No. 435. *Arizona Grocery* concerned an effort by the ICC to revisit, and declare unlawful, a rate prescription the ICC itself had already rendered in a *final* order in a *distinct and already concluded case*. 284 U.S. at 381-382; 49 F.2d at 564-565. This case, in contrast, involves a series of orders (following rehearing petitions and compliance filings) within a single case.

1. *Arizona Grocery* was the culmination of *three* distinct and sequential cases before the ICC, each prompted by the filing of different complaints addressing the rates for shipping sugar from points in California to points in Arizona. 284 U.S. at 381-382; 49 F.2d at 564-565. In the first case, certain shippers filed a petition challenging filed rates for shipping sugar from points in California to Phoenix. The ICC determined that future rates would be unreasonable to the extent they exceeded 96.5 cents per hundred pounds. 284 U.S. at 832; *Phoenix Chamber of Commerce*, 62 I.C.C. at 416. The carriers complied by establishing a rate of 96 cents, which they later reduced to 86.5 cents and then to 84 cents. 284 U.S. at 382; 49 F.2d at 565. Then certain shippers "filed a new petition," commencing a *second* case, attacking the new rate. 284 U.S. at 382. The ICC resolved the petitions by "fil[ing] a report prescribing for the future a maximum reasonable rate of 71 cents." 284 U.S. at 382; see *Traffic Bureau of Phoenix Chamber of Commerce* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 95 I.C.C. 244 (1925). The ICC found that the complaining shippers were entitled to reparations, but no order for their payment was made in that second case. 284 U.S. at 382; 95 I.C.C. at 248.

When a third case challenging those rates was commenced, the ICC consolidated it with the claims for reparations from the second case. 284 U.S. at 383; 49 F.2d at 565. In that third case, the ICC found that the rates for sugar were unreasonable in the past to the extent that they

exceeded 71 cents from Southern California and 73 cents from Northern California. *Traffic Bureau of Phoenix Chamber of Commerce* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 140 I.C.C. 171 (1928). The ICC awarded reparations for shipments between February 21, 1923. and February 10, 1925 (during which time the rates were below the previously established and final maximum rate, set in the prior proceeding, of 96.5 cents). 284 U.S. at 382; 49 F.2d at 565. This Court's decision was issued on review of that third case; it held that a carrier cannot be ordered to pay reparations for having charged the rate that the ICC itself previously prescribed in a final order. 284 U.S. at 386-387.

Unlike in *Arizona Grocery*, all of the orders at issue here are part of a *single* ongoing proceeding. This is not a case where the Commission, after reaching a final decision that prescribes a particular rate, goes back and second-guesses its prior judgment. It thus does not run afoul of *Arizona Grocery*'s holding that, where "the Commission has made an order [with prescriptive effect], it may not *in a subsequent proceeding*, * * * ignore its own pronouncement * * * and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed." 284 U.S. at 389 (emphasis added); see *id.* at 390 ("[T]he Commission * * * may not * * * subject a carrier to the payment of reparation measured by what the Commission now holds it should have decided *in the earlier proceeding* to be a reasonable rate.") (emphasis added).

Here, the Commission did not go back and decide that some final determination of reasonableness in a prior proceeding was error. There was instead one ongoing proceeding. As the Commission itself explained:

> It is clear from the Supreme Court's decision [in *Arizona Grocery*] that the failure of the Interstate Commerce Commission was to attempt to revisit its prior decision retroactively after it had fixed a specific rate, the carriers had complied, and the case was

> closed. The [ICC] did so in the context of a new complaint attacking the current rate. None of these factors is involved in the existing case * * * .

Pet. App. 143a n.18. The D.C. Circuit reached precisely the same conclusion: "FERC did not finalize a maximum reasonable rate in Opinion No. 435 and in fact repeatedly stated that it was not doing so." Pet. App. 63a. The Commission's decision thus does not permit shippers to "relitigate decisions" that have already been made. Pet. 17.[5]

To be sure, during the course of that single proceeding, the Commission required petitioner to submit compliance filings that showed its calculations and provided new rates that did not incorporate previously identified errors. But the Commission suspended those rates and allowed them to go into effect subject to an express condition that petitioner refund any amounts found not to be just and reasonable. As the court of appeals observed, FERC has "been clear from the outset and throughout that no final rate determination would be made until the OR92-8 proceedings were complete." Pet. App. 65a; see *id.* at 64a ("The record shows that at each point, the Commission said the final East line rates would not be established until the OR92-8 proceedings were completed.").[6] Likewise, there is thus no conflict with the

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[5] Petitioner states (Pet. 10) that "[t]he same argument" regarding the lack of finality of the Commission's rate order was raised in *Arizona Grocery* itself, implying that *Arizona Grocery* also concerned a single, ongoing proceeding. See also Pet. 10-11 (quoting ICC language regarding modification of findings "in the same or a previous case."). The ICC in that case may well have attempted to reserve, as a general matter, authority to revisit rates, whether or not the proceeding setting the rates had been concluded. But the only question before the Court in *Arizona Grocery* was whether the ICC could reopen and reassess the conclusion of an earlier, final proceeding, with retroactive effect.

[6] The Commission reached the same conclusion: "[N]one of the prior opinions or orders in these proceedings have established a final,

principle that a "carrier's obedience to a *conclusive and continuing* order prescribing the maximum reasonable rate thereafter to be charged, necessarily results in the maintenance and application of rates which, measured by the only *final* standard which the law of the land recognizes, are just and reasonable." *Arizona Grocery*, 284 U.S. at 377 (emphasis added). Opinion No. 435 by its terms was not a "conclusive" order setting a "final" standard.

2. Petitioner's position that *Arizona Grocery* applies within a single proceeding, where there has been no final determination of reasonableness, is likewise contrary to the administrative scheme and this Court's precedents. As an initial matter, the rehearing process provided by the ICA, 49 U.S.C. § 17(6), and judicial review provided by Section 17(9) of the ICA, 49 U.S.C. § 17(9), and 28 U.S.C. §§ 2321, 2342, and 2344, contemplate that Commission decisions are—until rendered final on direct review—subject to revision. "The Commission's determination of the reasonableness of a particular rate, *if validly made*, is absolutely conclusive." *Arizona Grocery*, 284 U.S. at 376 (emphasis added). When the Commission errs, it is entitled to reconsider determinations and correct its own mistakes through rehearing within the same proceeding. Likewise, erroneous determinations can be vacated, reversed, or modified on judicial review, stripping them of any force. *Id.* at 386 & n.15 (noting that ICC determinations could be invalidated on judicial review where, among other things, the evidence does not support the findings); *id.* at 387 (noting that, if the ICC set an unreasonably high rate, its

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specific rate level that [petitioner] should include in any final and definitive compliance filing. In fact, it became clear after the issuance of Opinion No. 435 that the large number of requests for rehearing and continued review of technical issues raised by comments to [petitioner's] first compliance filing (that to Opinion No. 435), would necessitate a further compliance filing." Pet. App. 143a-144a.

order would be a nullity). It is well settled that agencies have inherent authority in the course of a single proceeding to correct their own errors and place parties back in the position that they would have occupied had the error not been made. See *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); see also *Natural Gas Clearinghouse* v. *FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992). Consequently, *Arizona Grocery* has no application where the decision approving the rate as lawful is reversed on judicial review. *Delta Air Lines* v. *Civil Aeronautics Board*, 280 F.2d 636, 640 (D.C. Cir. 1961). *A fortiori*, it has no application where the agency during a single, ongoing proceeding, does not hold any particular rate reasonable, expressly declares that it has not reached a final conclusion, and ultimately determines that a rate proposed on an interim basis during the course of the proceeding is unlawful.

3. Petitioner's position likewise cannot be reconciled with this Court's decisions in *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631 (1978), and related cases. In *Trans Alaska*, the Commission responded to an initial rate filing by directing an oil pipeline to file interim rates to go into effect, subject to refund, during the suspension period for the initial rates. This Court held that, while Section 15(7) of the ICA does not expressly provide for such a procedure, nothing in the statute precluded the imposition of interim rates, subject to refund. The Court reasoned that the Commission has "powers 'ancillary' to its suspension power which do not depend on an express statutory grant of authority." 436 U.S. at 654. Further, "the touchstone of ancillary power [is] a 'direc[t] relat[ionship]' between the [refund] power asserted and the Commission's 'mandate to assess the reasonableness of * * * rates and to suspend them pending investigation if there is a question as to their legality." *Id.* (quoting *United States* v. *Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 514 (1976)). The Court noted that the

refund condition "allow[ed] the Commission * * * to pursue 'a more measured course' and to 'offe[r] an alternative tailored far more precisely to the particular circumstances' of these cases." *Id.*

This Court has found the same authority under a variety of analogous statutes. For example, more than 30 years before *Trans Alaska*, in *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 583-585 (1942), the Court upheld a Federal Power Commission ("FPC") order requiring interim rates in response to a complaint challenging existing rates under Section 5 of the Natural Gas Act ("NGA"), which is analogous to Section 15(1) of the ICA. Noting that the NGA was modeled on the ICA—the statute at issue here—the Court concluded that agencies administering such statutes "are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances." 315 U.S. at 586. The Court, moreover, relied on Section 16 of the NGA, which gives the FPC power to issue such orders as it deems necessary to carry out the NGA. The ICA includes a similar provision. In particular, Section 15 of the ICA declares that the ICA, by granting the Commission enumerated powers, "shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this chapter."

Similarly, eight years after *Trans Alaska*, the Court in *United States* v. *Fulton*, 475 U.S. 657, 670 (1986), upheld an agency's decision under the Flood Control Act to place rates into effect on an interim basis, subject to refund. The Court rejected claims that the filed rate increases could be placed into effect only upon an order finally approving them. The Court found no statutory bar to the agency's approval of interim rates, concluding that the procedure properly reflected a balance of statutory goals to protect consumers and to ensure that federal hydroelectric programs recover their costs. Petitioner provides no

compelling reason for calling this settled body of case law—followed by the court of appeals here, Pet. App. 68a—into question.[7]

Petitioner likewise errs in asserting—without citing supporting authority—that FERC's use "of 'interim' prescription powers is without statutory foundation." Pet. 18. FERC did not prescribe any rates here; petitioner proposed the interim rates, and FERC merely accepted them subject to a refund condition. See pp. 5-8 and 13-16, *supra*. In any event, the ancillary authority this Court upheld in *Trans Alaska* is based in statutory text. "The foregoing enumeration of powers *shall not exclude* any power which the Commission would otherwise have in the making of an order under the provisions of this chapter." 49 U.S.C. § 15(16) (emphasis added).

C. Petitioner's Policy Contentions Lack Foundation

Finally, and for related reasons, petitioner's policy arguments are not implicated by this case. There is no risk of millions of dollars of liability being imposed based on compliance with a prescribed rate. Pet. 18. This case simply did not involve a rate prescribed by the Commission. See pp. 13-16, *supra*. Nor is there any difficulty with notice (Pet. 20) or the ability to rely on compliance with agency mandates (Pet. 21). Here, unlike in *Arizona Grocery*, the Commission made it clear throughout that there could be no reliance because it had not yet determined the just and reasonable rate. Pet. App. 65a. Petitioner cannot claim surprise.

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[7] While petitioner attempts to distinguish *Trans Alaska* as involving only an *initial* rate, Pet. 16 n.16, petitioner does not explain why *Trans Alaska*'s reasoning, and the ancillary authority it upholds, should not apply with equal force to initial and newly changed rates alike. Petitioner, moreover, all but ignores the Court's other decisions upholding similar authority in cases like *Natural Gas Pipeline* and *Fulton*, *supra*.

Petitioner's claim of dire consequences also cannot be reconciled with the fact that the D.C. Circuit has long adhered to the rule it followed in this case. For at least a decade, the D.C. Circuit has made it clear that *Arizona Grocery*'s prohibition on retroactive ratemaking has no application where the Commission provides notice that the rate allowed to take effect is provisional and subject to revision in an ongoing proceeding:

> The [*Arizona Grocery*] rule against retroactive ratemaking, however, "does not extend to cases in which [the parties invoking the rule] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service." The goals of equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed.

OXY USA, Inc., 64 F.3d at 699 (citations omitted). That principle has been applied in a variety of contexts.[8] So too has the rule that agencies may correct their errors during the course of ongoing proceedings and restore the parties to the position they would have occupied absent the error. See p. 21, *supra*. Far from creating new law, the decision below

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[8] The D.C. Circuit made a similar observation in *Natural Gas Clearinghouse*, 965 F.2d at 1075 (quoting *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990)): "[I]t is not that notice relieves the Commission of the bar on retroactive ratemaking, but that it 'changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.'" The mere existence of ongoing litigation and the absence of a final, non-appealable order have been held sufficient to provide the requisite notice. *Canadian Ass'n of Petroleum Producers* v. *FERC*, 254 F.3d 289, 299-300 (D.C. Cir. 2001).

merely applies principles that long have governed in this area.

Petitioner also urges (at 20) that, because shippers may pass overcharges onto their customers—and carriers cannot recover undercharges from shippers—forcing carriers to pay reparations is inequitable. But the proposal that carriers be permitted to *charge and retain* unjust and unreasonable rates is contrary to the statute's fundamental prohibition on unjust and unreasonable rates, and its purpose of preventing oil pipelines from exercising the monopoly power they commonly have.[9] Indeed, the one case petitioner cites in support of its argument, *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, 479 n.19 (1959), arose under the Motor Carrier Act. Unlike pipelines, "[m]otor carriers have practically no traffic which is noncompetitive and there is little danger that they will exact exorbitant charges." *Id.* at 477 n.18. It is far from clear, moreover, that carriers like petitioner would be barred from recovering from shippers if, on rehearing or appeal, it turns out that FERC set the rate unreasonably low. See *Callery Properties*, *supra*; see also *Natural Gas Clearinghouse*, *supra*. Petitioner's appeal to equity is thus without basis.

This Court, in any event, has rejected petitioner's policy arguments when upholding virtually indistinguishable

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[9] The Hepburn Act of 1906, 34 Stat. 584, made oil pipelines common carriers subject to the ICA in response to the abusive practices of the Standard Oil Company. That company was (among other things) forcing producers to sell their oil to it in the field because it would not otherwise transport the oil through its extensive oil pipeline network. *United States* v. *Ohio Oil Co.*, 234 U.S. 548 (1914); *United States* v. *Champlin Refining Co.*, 341 U.S. 290, 297-298 (1951); *Valvoline Oil Co.* v. *United States*, 308 U.S. 141, 144-145 (1939). A chief proponent of the legislation, Senator Henry Cabot Lodge, stated on the Senate floor that the Standard Oil Company had "the entire oil industry of the country by the throat." 40 Cong. Rec. 7000 (1906).

practices as not only lawful but laudable. In *Trans Alaska*, for example, the Court upheld the Commission's practice of suspending initial rates but allowing them to go into effect subject to a refund of any sums later found unreasonable. The Court observed that such a practice "allow[ed] the Commission * * * to pursue 'a more measured course' and to 'offe[r] an alternative tailored far more precisely to the particular circumstances' of [that case]." 436 U.S. at 655. That practice, "far from being condemnable, is an intelligent and practical exercise of its suspension power which is thoroughly in accord with Congress' goal * * * to strike a fair balance between the needs of the public and the needs of regulated carriers." *Id.* at 653. The same is true here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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